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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-1706

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v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S OPENING BRIEF

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 88 Wn.2d 315, 559 P.2d 997 (1977) and is reproduced in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

The opinion of the court below was filed on February 3, 1977 (Pet. Cert., App. A). In Washington, no separate judgment is entered. The remittitur was entered on March 7, 1977 (Pet. Cert., App. B). On June 1, 1977, the Petition for a Writ of Certiorari

was docketed in this Court. On October 3, 1977, this Court granted certiorari. ..... U.S. ..... (1977).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the Commerce or Import-Export Clause of the United States Constitution prohibit a general, nondiscriminatory state tax which is (a) imposed on the privilege of engaging in the business of stevedoring, and (b) measured by the gross receipts from stevedoring activity conducted entirely within the taxing state?[1]

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND ADMINISTRATIVE RULES

United States Constitution, Article I, Section 8, Clause 3 provides in pertinent part:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States * * *;"

The United States Constitution, Article I, Section 10, Clause 2 provides in pertinent part:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws * * *;"

The relevant state statutes and administrative

[1]The QUESTION PRESENTED is phrased somewhat differently from that set forth in the Petition for Certiorari, but the substance of the question presented for review remains the same as that set forth in the Petition and no additional questions are raised. Rule 40(2), Rules of the Supreme Court.

rule are Revised Code of Washington 82.04.220, 82-.04.290 and 82.04.460(1) (Appendix A hereto), and Washington Administrative Code 458-20-193D (Appendix B hereto).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a writ of certiorari directed to the Supreme Court of Washington to review a final judgment of that court declaring a state tax repugnant to the Commerce[2] and Import-Export[3] Clauses of the United States Constitution; Pet. Cert., App. A.

B. Identity of the Parties.

The petitioner, Department of Revenue of the State of Washington (hereinafter the "State") is an administrative agency of the State of Washington charged with the duty of administering and enforcing the excise tax laws of the state. As part of its duties, the Department of Revenue is empowered to adopt rules and regulations necessary or desirable to the administration of the state's tax laws. RCW 82.01.060.

The respondents, Association of Washington Stevedoring Companies and Washington Public Ports Association (hereinafter the "Stevedores") are associations or corporations comprised of members who engage in the business of stevedoring in the State of Washington. (App. p. 3).

[2]U.S. Const., Art. I, §8, Cl. 3.
[3]U.S. Const., Art. I, §10, Cl. 2.

C. **Business of the Stevedores.**

Stevedoring consists of loading and unloading cargo from ships. As reflected in the findings of the trial court, the business of the Stevedores in this case consists of activities of exactly the same nature considered by this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (App. p. 5, 17). The Stevedores contract with ship owners to load or unload vessels through the Stevedores' own employees, controlling and directing the work themselves. *Puget Sound*, 302 U.S. at 91. Vessels are unloaded by moving the cargo from the ship's hold to the "first place of rest" on the dock; and are loaded by moving the cargo from the place of rest on the dock to the ship's hold. *Puget Sound*, 302 U.S. at 93. More precisely put, stevedoring consists of taking cargo from a place on the pier wholly within the territorial limits of the State of Washington and "* * * storing it properly for safety and for handling in or on the outgoing vessel along side, or of similarly unloading a vessel on its arrival." *Joseph v. Carter & Weekes Stevedoring Co., supra*, 330 U.S. at 425. The vessels and cargo are moving exclusively in foreign or interstate commerce.

D. **Nature of the Tax.**

The tax in question—Washington's general business and occupation tax ("B&O tax")—is virtually the same tax considered by this Court in *Puget Sound*

Stevedoring Co. v. Tax Comm., 302 U.S. 90 (1937).[4] The tax is imposed on the act or privilege of engaging in business activities, measured by the application of rates to the gross sales or gross income of the business. RCW 82.04.220 (App. A hereto). In the case of stevedoring activity, which is classified as a general business or service activity, the measure and rate of the tax at the inception of this litigation was the gross income of the business multiplied by the rate of 1 percent.[5]

The tax reaches virtually every form of business activity conducted in this state. The only major business activities exempt from the tax are farming (RCW 82.04.330), and insurance (RCW 82.04.320). Gross receipts from certain types of income-producing activities are deductible from the measure of the tax. RCW 82.04.430.

In the case of income from services rendered by persons taxable under RCW 82.04.290 who maintain places of business both within and without the state, the tax is apportionable. RCW 82.04.460 (App. A hereto). However, this apportionment requirement does not apply to the Stevedores because they do not

[4]The tax is not unfamiliar to the Court. In addition to *Puget Sound Stevedoring, supra*, this Court has considered the Washington B&O tax in the following cases: *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enterprises, Inc. v. Washington*, 352 U.S. 806 (1956) [per curiam]; *General Electric Co. v. Washington*, 347 U.S. 909 (1954) [per curiam]; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Rainier National Park Co. v. Martin*, 302 U.S. 661 (1938) [per curiam]; *Silas-Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); and *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936).

[5]At the present time, the rate is 1.06 percent, due to a temporary across-the-board rate increase due to expire in June, 1979. Laws of 1977, 1st ex. sess., chapter 324, §1, codified as RCW 82.04.2901.

maintain places of business both within and without the state, nor is there any allegation that they do so.

In sum, Washington's B&O tax, as applied to the Stevedores, is imposed upon the business of loading and unloading cargo from ships engaged in interstate and foreign commerce, measured by the gross receipts received by the Stevedores from this activity. The loading and unloading activities take place entirely within the territorial limits of the State of Washington.

E. Proceedings Below.

Prior to 1974, and in response to the 1937 decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, *supra*, a State regulation excluded from the Business and Occupation tax compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo was moving in interstate or foreign commerce and where the work was actually directed and controlled by the stevedoring company. On May 3, 1974 the State amended its rule and adopted Rule 193-D (App. B hereto) providing in part:

> "In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax

> subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable."
>
> • • • •
>
> "EXAMPLES OF TAXABLE INCOME"
>
> • • • •
>
> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable."

Subsequent to the adoption of the above rule, the Stevedores sought a declaratory judgment on the validity of the rule pursuant to a procedure authorized by RCW 34.04.070. The sole grounds advanced by the Stevedores for the invalidity of the rule are contained in paragraph VII of their complaint (App. 5) which, set forth in its entirety, reads as follows:

> "The Department's revised Rule 193-D is invalid because it violates the commerce clause, Art. I, section 8, of the United States Constitution (empowering Congress to regulate commerce with foreign nations and among the several states). The rule is also invalid to the extent that it affects foreign commerce covered by the import-export clause contained in Article I, section 10 of the United States Constitution."

The trial court, although noting that if it viewed the case as one of first impression it would uphold the validity of the B&O tax on the Stevedores, nevertheless felt constrained by this Court's decisions in *Puget Sound Stevedoring v. Tax Commission*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Steve-*

doring Co., 330 U.S. 422 (1947), and struck down the regulation as violative of the Commerce and Import-Export Clauses of the United States Constitution. (App. 8-14, 19). On appeal, the Supreme Court of Washington affirmed the decision of the trial court with two justices dissenting. The majority found the *Puget Sound Stevedoring*, *supra*, and *Carter & Weekes*, *supra*, cases to be factually indistinguishable from the present case (Pet. Cert., App. A, p. 8; 88 Wn.2d at 316), and finding no indication that this Court had overruled these two cases by implication the majority felt bound to follow what it viewed as controlling precedent. 88 Wn.2d at 319.

The minority would have upheld the State's rule on taxing stevedores, finding that the "Stevedoring Cases" relied on by the trial court and the majority have been *impliedly* overruled by this Court, citing among other cases, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) and *Colonial Pipeline v. Traigle*, 421 U.S. 100 (1975). The minority found that all stevedoring activity takes place wholly within the State and that even if stevedoring could be said to have interstate characteristics, the activity still may be taxed by a nondiscriminatory gross receipts tax if it is apportioned and does not reach activities beyond the State's borders. (Pet. Cert. App. A, p. 17). The minority further found that:

> "[t]his state's business and occupation tax is not selectively imposed. It is a general occupation tax and does not substantially impair or prohibit transportation. As such it does not violate the import-export clause." (Pet. Cert., App. A, p. 17), 88 Wn.2d at 321.

SUMMARY OF ARGUMENT

This case presents the issue of the continuing validity of the principles enunciated in *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), in light of this Court's decisions in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

The state tax in question, Washington's B&O tax on the act or privilege of engaging in business, measured by gross receipts derived by Stevedores from loading and unloading vessels engaged in foreign and interstate commerce, produces none of the effects prohibited by the Commerce Clause. There is no claim of lack of nexus; nor is there a claim that the tax is unrelated to the opportunities, protections and benefits afforded the Stevedores by the State; nor is there a claim that the State's tax discriminates against interstate and foreign commerce in favor of intrastate commerce. There is a claim of the possibility of "multiple burdens", in the sense that other states may be permitted to tax stevedoring activity a the end of an interstate journey, but that claim is illusory, at best.

In terms of the Commerce Clause, the tax upheld in *Complete Auto Transit* is identical in operation and effect to the tax here in question. Both

taxes are levied on the privilege of engaging in transporting goods moving in interstate commerce, measured by gross receipts from that portion of the journey entirely within the taxing state. The Court in *Complete Auto Transit* upheld Mississippi's tax because it did not produce the effects on interstate commerce forbidden by the Commerce Clause—discrimination against interstate commerce or the possibility of multiple tax burdens on interstate commerce—even though at an earlier time the tax would have been labeled a "direct" tax on interstate commerce. In contrast, the "Stevedoring Cases" struck down gross receipts taxes on the privilege of engaging in transporting goods moving in interstate and foreign commerce on the grounds that such taxes were "direct" taxes on interstate commerce, without considering the effect of the tax. Accordingly, the Court, on authority of *Complete Auto Transit*, should uphold Washington's tax on the business of engaging in stevedoring activities and overrule the "Stevedoring Cases".

Insofar as the validity of the tax in question under the Import-Export Clause is concerned, the case is controlled by the analysis and result in *Michelin Tire Corp. v. Wages, supra*. In upholding a general, nondiscriminatory ad valorem personal property tax imposed on goods held by an importer in its warehouse, this Court in *Michelin* focused on the meaning of the term "imposts" and "duties" with reference to the purposes to be served by the Import-

Export Clause. The Court reasoned that a nondiscriminatory state tax, not directed toward imports as such was not an "impost" or "duty" within the meaning of the Import-Export Clause because such a tax (1) would not deprive the United States of the exclusive power to regulate foreign commerce, (2) would not deprive the United States of the exclusive right to all revenues from imposts and duties on exports and imports, and (3) would not prohibit the free flow of imported goods among the states by exacting "transit fees" from goods moving through seaboard states to inland states. Washington's B&O tax is a general, nondiscriminatory tax not directed at imports or exports as such and is not a mere "transit fee" for the privilege of transporting goods through the state. Consequently, it does not constitute an "impost" or "duty" within the meaning of the Import-Export Clause, and the tax should be sustained on authority of *Michelin*.

ARGUMENT

A. Introduction.

This case squarely presents the issue of the continuing validity of the principles enunciated in *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), hereinafter referred to as the "Stevedoring Cases". The State asks nothing less of this Court than to overrule its prior decisions in the Stevedoring Cases on the grounds that the principles upon which the Stevedoring Cases are based

are not reconcilable with the principles established in the recent cases of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Therefore, at the outset, it is important to establish what this case does *not* involve. First, unlike many cases involving state taxation of interstate commerce or activities related thereto, there is no claim that the state tax violates due process.[6] There is no claim or showing of lack of nexus. Nor is there a claim or showing that the tax is unrelated to the opportunities, protections and benefits afforded the stevedores by the state. Second, there is no claim or showing that the State's tax discriminates against interstate and foreign commerce in favor of intrastate commerce.[7] Third, there is no claim or showing that the tax is a licensing provision or otherwise amounts to a direct regulation of commerce.[8]

Rather, the sole claims advanced by the Stevedores are based upon the rationale of the "Stevedoring Cases," namely: (1) the Commerce Clause, of its own force and effect, creates a free trade zone for interstate commerce, and (2) an unapportioned gross receipts tax on the business of local stevedoring creates the risk of a multiple burden on interstate commerce because other states may tax stevedoring activity at the end of the interstate journey.[9]

[6]See, *Standard Pressed Steel v. Washington*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

[7]See, *Boston Stock Exchange v. State Tax Comm.*, ...U.S. ..... (1977); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946).

[8]See, *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

[9]*Joseph v. Carter & Weekes Stevedoring Co.*, *supra*, 330 U.S. at 429.

For purposes of analysis, the State's argument is divided into two categories; (1) the validity of the State's tax under the Commerce Clause and (2) the validity of the State's tax under the Import-Export Clause. To a certain extent, the considerations helpful to a resolution of the issues under these two constitutional provisions overlap, but because the purposes of the Commerce Clause and Import-Export Clause are in many respects different, we discuss each separately.

B. The Challenged Tax on Stevedoring Activities Comports With the Commerce Clause.

1. *A state may, consistent with the Commerce Clause, impose a tax on the act or privilege of engaging in the business of transporting goods moving in interstate or foreign commerce where the tax (a) is applied to an activity with a substantial nexus to the taxing state, (b) is fairly related to the opportunities, protections, and benefits afforded the activity by the taxing state, (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce, and (d) does not expose the interstate or foreign commerce activity to the risk of multiple taxation burdens.*

In a series of recent cases, this Court has finally resolved more than 40 years of judicial conflict over the scope of the restrictions imposed by the Commerce Clause on the power of a state to tax interstate and foreign commerce conducted entirely within that state's borders. Establishing the scope of these re-

strictions requires the reconciliation of competing demands, on the one hand, from the states for tax revenue to support governmental services provided such commerce and, on the other hand, from the necessity that interstate and foreign commerce not be restrained or unduly burdened by artificial barriers or tariffs set up by the states through which such commerce moves.

Over the years, this Court, as chief arbiter of these competing demands, has adopted two seemingly inconsistent approaches to determining the validity of a state tax on interstate commerce: (1) the "direct-indirect" burden on interstate commerce approach[10] and (2) the cumulative or "multiple burdens" approach.[11] The "direct-indirect" approach is based upon the view that interstate commerce should enjoy total immunity from state taxation.[12] Under this approach state taxes found to be levied "directly" on interstate commerce, e.g., taxes imposed on the privilege of engaging in interstate commerce, measured by gross receipts, whether or not apportioned, were struck down[13] while state taxes said to be levied only "indirectly" on interstate commerce, e.g. taxes imposed on some local event determined to be separate and apart from interstate commerce, were upheld.[14]

[10]See, *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Ozark Pipeline Corp. v. Monier*, 266 U.S. 555 (1925).

[11]See, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

[12]Hartman, *State Taxation of Interstate Commerce*, p. 31 (1953).

[13]See, *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U.S. 160 (1930); *Crew Levick, supra*; *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

[14]See, *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923).

The "multiple burdens" approach is based upon the view that interstate commerce should contribute to the cost of local governmental services it receives so long as it is not unreasonably restrained by being subjected to the risk of multiple tax burdens not borne by local business.[15] Under this approach, state taxes on interstate commerce found to be capable of being repeated by each state through which the commerce moved were struck down[16] while state taxes on interstate commerce not capable of being repeated by each state were upheld.[17]

Permitting a state to impose a tax on the privilege of engaging in a component part of interstate commerce wholly within the taxing state, e.g., the privilege of exercising corporate powers,[18] so long as the tax is imposed on and measured by activities wholly within the taxing state on the grounds that it is an "indirect" type tax accomplishes the same result as would the "multiple burdens" test; interstate commerce pays its way in the taxing state while at the same time there is no possibility that other states can tax the same activity. Thus, as a practical matter, the Court has in recent years permitted a variety of state taxes on interstate commerce which do not produce the "trade barrier" effect forbidden by the Commerce Clause, even though arguably the taxes could be said to be of a "direct nature". See, generally, W. Heller-

[15]Hartman, *State Taxation of Interstate Commerce*, p. 38 (1953).

[16]See, e.g., *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939).

[17]*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[18]*Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948); *Colonial Pipeline v. Traigle*, 421 U.S. 100 (1975).

stein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: *Standard Pressed Steel* and *Colonial Pipeline*, 62 Va. L. Rev. 149, 177-180 (1976).

Nevertheless, until 1977, there remained one form of state taxation of interstate commerce—a tax on the privilege of engaging in interstate commerce —which was forbidden by this Court's decisions even though the tax did not in practical operation and effect discriminate against interstate commerce or expose it to the risk of multiple tax burdens. *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). The rationale for these decisions was twofold: (1) states had no power to tax the privilege of engaging in interstate commerce because it was a privilege given by the federal government (*Crutcher v. Kentucky*, 141 U.S. 47 [1891]), and (2) a privilege tax is a "direct" tax on interstate commerce forbidden by the Commerce Clause of its own force and effect. *Spector*, *supra*.

The "*Spector* Rule" as it was known, ignored the practical economic consequences of a state tax on interstate commerce and instead substituted an inquiry into the phraseology of the tax. For this reason, the rule was severely criticized by commentators. See, e.g.. Barret, State Taxation of Interstate Commerce —"Direct Burdens", "Multiple Burdens" Or What Have You?, 4 Van. L. Rev. 497, 505 (1951); Hartman, State Taxation of Interstate Commerce, p. 45

(1953); Comment: State Taxation of Interstate Commerce: *Roadway Express*, The Diminishing Privilege Tax Immunity, and the Movement Toward Uniformity and Apportionment, 36 U. Chi. L. Rev. 186, 203.

As stated in Hartman, *supra*, at p. 31-43:

> "The view that interstate commerce is immune from taxation, with its concomitant expressions of 'direct' and 'indirect' effects and burdens, for many years remained the alleged test by which the court struck down a wide variety of state taxes. This conceptual and unrealistic mode of judicial thought gave very little consideration to the practical question of economic burden of the tax. What condemned the tax was not any actual or probable hampering effect of the exaction on the commerce; the vice of an invalid tax was simply the 'direct' bearing of the tax on interstate commerce and that alone * * * The alleged test simply implied the impotence of state power; it described a result reached, not the reasons for that result. The Court was more concerned with captions than with consequences."

Finally, in 1977, the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), was presented with a case directly calling into question the continued validity of the "*Spector* Rule". *Complete Auto Transit* involved a Mississippi tax which was imposed on the "privilege of doing business" within the state as applied to the activity of a motor carrier transporting manufacturer's automobiles between points in the state, and was measured by the gross receipts from that transportation. The automobiles concededly were moving in interstate commerce

from the manufacturer to the ultimate retailer. The taxpayer transported the vehicles in its own trucks from a railhead in Mississippi to dealers throughout the state.

The taxpayer contended that the legal incidence of the Mississippi tax was upon the "privilege" of engaging in interstate commerce and was thereby prohibited under the "*Spector* Rule". No claim was made that Mississippi lacked sufficient nexus with the taxpayer or that the tax discriminated against interstate commerce or was unfairly apportioned or was unrelated to the services provided the taxpayer by the state. Furthermore, although the taxpayer claimed that the Mississippi tax created an unacceptable risk of undue burdens, no showing was made that undue burdens existed in fact.

In a unanimous decision, this Court upheld Mississippi's tax on the unapportioned gross receipts derived from wholly intrastate transportation in interstate commerce.

In its analysis of the case, the Court first noted that the "*Spector* Rule" ignores any consideration of the practical effect of a state tax on interstate commerce and reflects a philosophy that interstate commerce should enjoy a type of "free trade" immunity from state taxation. 430 U.S. at 278. The "*Spector* Rule" thus differs sharply from the "multiple burdens" approach taken by the Court beginning with *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), which concentrated on the practical

effects of the tax on interstate commerce. In describing the "multiple burdens" line of cases, this Court stated:

> "These decisions have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (footnotes omitted) 430 U.S. at 279.

These decisions reconcile the competing demands on interstate commerce by requiring that interstate commerce pay its way in the taxing state, while at the same time insuring that no state can erect artificial barriers or tariffs to the conduct of interstate commerce.

In rejecting the "*Spector* Rule" this Court is now firmly and clearly committed to the "discrimination-multiple burdens" approach advanced by Mr. Justice Stone in his dissent in *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927), and in his opinion for the majority in *Western Live Stock, supra*. Under this approach, a state may, consistent with the Commerce Clause, impose a tax on the privilege of engaging in the business of transporting goods moving in interstate or foreign commerce where the tax (a) is applied to an activity with a substantial nexus to the taxing state,[19] (b) is fairly related to the opportunities, protections,

[19] See, *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975).

and benefits afforded the activity by the taxing state,[20] (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce,[21] and (d) does not expose the interstate or foreign commerce activity to the risk of multiple burdens.[22]

None of the above cited cases involve "foreign commerce". However, in this context, it has long been assumed that the Foreign Commerce and Interstate Commerce Clauses of the United States Constitution are indistinguishable. For example, in *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878), a case striking down a discriminatory tax on auctioneers of imported goods, the Court drew freely upon cases striking down discriminatory taxes on interstate commerce, stating:

> "If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign state is equally forbidden."

See, also *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 at 296 (1917).

Also instructive is *Matson Navigation Co. v. State Board of Equalization*, 297 U.S. 441 (1936). *Matson* involved the imposition of California's tax on corporations exercising their corporate franchise within the state, measured by apportioned net income derived from intrastate, interstate, or foreign commerce. The taxpayer was a corporation which, in

[20]See, *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940).

[21]See, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946).

[22]See, *Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

addition to doing a substantial intrastate business in California, was engaged in the transportation of cargo by sea between the west coast of the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. California included in its taxable income base an apportioned segment of the net income derived from interstate and foreign commerce operations. In upholding the tax, the Court did not distinguish between income derived from interstate operations as opposed to income derived from foreign commerce operations. Both types of income were held to be includable in the tax base.

There is no good reason why foreign commerce should be treated any differently from interstate commerce. When carried on within the boundaries of a state, foreign commerce should pay its own way, so long as such commerce is not discriminated against or subjected to the risk of multiple burdens. As applied to the activities of handling or transporting goods moving in foreign commerce a state tax stands on the same footing under the Foreign Commerce Clause as it does under the Interstate Commerce Clause. Both clauses are worded the same way, i.e. as a restriction upon state regulation. If a nondiscriminatory state tax, fairly apportioned, is not considered a forbidden "regulation" of interstate commerce, a nondiscriminatory state tax, fairly apportioned should not be considered a forbidden "regulation" of foreign commerce.

In sum, after *Complete Auto Transit v. Brady*,

supra, it is settled that a state may impose a tax on the privilege of engaging in the business of transporting goods moving in interstate or foreign commerce measured by gross receipts so long as the tax (a) is applied to an activity with a substantial nexus to the taxing state, (b) is fairly related to the opportunities, protections and benefits afforded the activity by the taxing state, (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce, and (d) does not expose the interstate or foreign commerce activity to the risk of multiple burdens.

2. *Washington's B&O tax on the privilege of engaging in local stevedoring activity, measured by gross receipts, exhibits adequate nexus, is nondiscriminatory, and does not expose interstate or foreign commerce to the risk of multiple burdens.*

Washington's B&O tax, as applied to the Stevedores, is imposed upon the act or privilege of engaging in the business of loading and unloading cargo from ships engaged in interstate and foreign commerce, and is measured by the gross receipts received by the Stevedores from this activity. RCW 82.04.220 (App. A hereto). The tax is unapportioned, in the sense that it is measured by the entire gross receipts of the Stevedores from loading and unloading activities; but the tax is, as a practical matter, self apportioning because the loading and unloading activities of the Stevedores take place entirely within the territorial limits of the State of Washington and nowhere else.

The tax here in question is virtually indistinguishable from the Mississippi tax considered in *Complete Auto Transit*. Mississippi's tax was imposed on the privilege of engaging in the business of transporting persons or property for hire between points within the state, measured by gross receipts from that transportation. The only difference between Washington's tax and the Mississippi tax (other than the rate) was the requirement that the Mississippi tax be added to the gross sales price and collected from the purchaser. Miss. Code Ann. §10117 (1942); 430 U.S. at 275. Washington's B&O tax, unlike the Mississippi tax, is clearly imposed upon the Stevedores, and not the steamship companies the Stevedores service. RCW 82.04.500 provides:

> "It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons."

Thus, unlike Mississippi's tax, which may, and probably would, be passed on directly to the owner of the goods moving in interstate commerce, Washington's tax is not required to be passed on to the owner of the goods moving in interstate or foreign commerce, and it is not at all clear as a matter of economics that the tax, or any substantial part of it is or will be passed on.[23]

[23]Thus, if one were still to subscribe to the "direct-indirect" theory

In the courts below, the Stevedores did not argue that Washington had insufficient nexus to impose its tax, nor did they argue that the tax was unrelated to the opportunities, protections and benefits afforded the Stevedores by the State of Washington. This is not surprising, given that the Stevedores conduct business exclusively within the State of Washington and are the recipients of numerous opportunities, protections and benefits, ranging from police and fire protection for their property to access to the state court system to enforce payment of stevedoring contracts.

Similarly, the Stevedores did not argue in the courts below that Washington's B&O tax discriminates against interstate or foreign commerce in favor of local commerce. This too, would be an empty exercise, because the tax rate on the stevedoring business is the same as the tax rate on most other persons who render services in the state, e.g. doctors, lawyers, accountants, etc. RCW 82.04.290 (App. A hereto). To be sure, the Washington State Legislature could manipulate the B&O tax in such a way as would be discriminatory against stevedoring activity. But as noted by the Court in *Complete Auto Transit*, *supra*, property taxes, income taxes, and "privilege" taxes are susceptible to being imposed with discriminatory results. *Complete Auto Transit*, *supra*, n. 15,

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of state taxation of interstate commerce Washington's tax would be a much stronger candidate for validity under the Commerce Clause than would have Mississippi's tax upheld in *Complete Auto Transit*, *supra*. Cf., *Silas-Mason Co. v. Tax Comm.*, 302 U.S. 190 (1937), which held that Washington's B&O tax on federal contractors is not an "unconstitutional burden" on the Federal Government. 302 U.S. at 190.

430 U.S. at 288. The mere possibility, however, of imposing a tax with discriminatory effects or other effects forbidden by the Commerce Clause is not grounds for striking down a state tax without those effects.

Finally, the Stevedores in the courts below did not argue that Washington's B&O tax on stevedoring exposed interstate or foreign commerce to the risk of multiple burdens. See, Brief of Respondents before the Washington Supreme Court, pp. 36-37. Thus, no effort was made to establish that Washington's B&O tax created a risk, actual or theoretical, that interstate commerce would be subject to multiple tax burdens. Nor could any such effort be successful.

The case for a theoretical possibility of multiple tax burdens created by the tax in question is set forth in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1946). That case involved a New York City gross receipts tax on the business of stevedoring in the City as applied to gross receipts from loading and unloading ships engaged in foreign and interstate commerce. Although primarily basing its decision to invalidate the tax as a "privilege" tax on the business of engaging in interstate and foreign commerce, citing *Puget Sound Stevedoring Co.*, 302 U.S. 90 (1937), the majority also noted that New York City's tax exposed interstate commerce to the risk of multiple tax burdens, finding that if New York City were able to tax the loading of ships, some other state could tax the unloading of ships, or vice versa.

Carter & Weekes, *supra*, 330 U.S. at 429. Justices Douglas and Rutledge, dissenting in part, found that no multiple burdens, actual or theoretical, could exist. The dissenters noted:

> "But in the Puget Sound Case any risk of multiple taxation was absent. The same is true of the present case. For in each the activity of loading and unloading was confined exclusively to the State that imposed the tax. No other state could tax the same activity.[a]
> "The tax therefore is in its application nothing more than a gross receipts tax apportioned to reach only income derived from activities within the taxing state." *Carter & Weekes*, *supra*, 330 U.S., 437-438 (footnote in the original).
> fn. 3—"The court suggests that the fact that similar stevedoring activity will be required at the destination creates a risk of multiple taxation, since the state of destination would be as free to tax the unloading as New York to tax the loading. This is only multiple in the sense that each state taxes what occurs within its borders; the two taxes would not be on the same activity. It is no more relevant that stevedoring is involved in both cases, than is the fact that two states may impose property taxes on terminals or trackage within their respective borders."

Clearly, Justices Douglas and Rutledge were correct. The multiple burden found by the Court to be present in the *Carter & Weekes* case is multiple only in the sense that the elements of interstate transportation are multiple. But the "multiple burdens" test is directed to the risk of taxation of the same *activity*. For example, in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1937), the Court found no risk of multiple burdens resulting from

state excise taxes on the various mechanical processes used to transport gas through interstate pipelines. Similarly, in *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951), the Court sustained a Maryland gross receipts tax on the business of transporting by rail goods moving in interstate and foreign commerce where the tax was apportioned on the basis of mileage within the state and did not reach any activities carried on beyond the borders of the state.

Finally, the commentators have criticized the *Carter & Weekes* majority on their view of "multiple burdens" effect. See, Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 710, at 744-46 (1947); Hartman, State Taxation of Interstate Commerce, pp. 204-207. It is thus apparent that under the proper view of the "multiple burdens" test, Washington's B&O tax on the business of engaging in stevedoring activity does not create the risk of a multiple burden on interstate commerce. Although nominally unapportioned, it is in fact apportioned exactly to the activities of the Stevedores within the State. It does not reach out beyond the state's borders to tax activities occurring elsewhere. No other state can impose a tax on the same stevedoring activity. Consequently, no multiple burden, actual or theoretical, exists.

For the foregoing reasons, it is clear that the tax in question, as applied to local stevedoring activity, meets the criteria for validity established by a long line of decisions of this Court culminating in

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The tax is applied to an activity with adequate nexus to Washington, it is fairly related to the services provided by the state, it does not discriminate against interstate or foreign commerce, and it does not expose interstate or foreign commerce to the risk of multiple burdens. In sum, there exists no reason to strike down this tax as violative of the Commerce Clause except upon the now discarded theory that a tax upon the privilege of engaging in interstate commerce is a direct tax on interstate commerce. See, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

3. *The "Stevedoring Cases" represent outmoded concepts, were wrongly decided, and should be overruled.*

Finally, we come to the issue of whether the "Stevedoring Cases", *Puget Sound Stevedoring, supra*, and *Joseph v. Carter & Weekes Stevedoring Co., supra*, should be overruled. First, it is clear that if the tax in the instant case is to be upheld, the "Stevedoring Cases" must be overruled. *Puget Sound Stevedoring* involved the same facts and virtually the same tax as is involved in the instant case. *Carter & Weekes, supra*, also involved the same type of tax—a city gross receipts tax on the privilege of engaging in business—as applied to the same type of stevedoring activity as is involved in the instant case. Indeed, both the trial court below and the Supreme Court of Washington found the "Stevedoring Cases"

to be indistinguishable from the instant case. See, Oral Decision of the Trial Court, App. 8; Opinion of the Washington Supreme Court, Pet. Cert. App. A, p. 10, 88 Wn.2d at 316.

The only question to be answered with respect to the continuing validity of the "Stevedoring Cases" under the Commerce Clause is whether they can stand, consistent with this Court's decision in *Complete Auto Transit*. The State has already demonstrated that Washington's B&O tax on the privilege of engaging in local stevedoring activity is indistinguishable in operation and effect from the Mississippi tax upheld in *Complete Auto Transit, supra*. See p. 23 *supra*. The state taxes involved in the "Stevedoring Cases" are equally indistinguishable in operation and effect from the Mississippi tax involved in *Complete Auto Transit*. In all cases, the tax is an unapportioned gross receipts tax imposed upon the privilege of engaging in the business of transporting goods moving in interstate commerce. The fact that *Complete Auto Transit* involved land transportation as opposed to water shipborne transportation involved in the "Stevedoring Cases" is irrelevant to a determination of the effects of the tax upon interstate or foreign commerce.

The only significant difference between the "Stevedoring Cases" and *Complete Auto Transit* is this Court's view of the nature and effect of a tax on the privilege of engaging in business in interstate commerce, measured by gross receipts fairly apportioned to the activities within the taxing state. In the

"Stevedoring Cases," the privilege tax was viewed to be a "direct" tax on interstate commerce and therefore a *per se* burden on that commerce. It was the "label" attached to the tax which offended the Commerce Clause, and not the effect in practical terms on interstate commerce. In *Complete Auto Transit* it was the *effect* of the tax in practical terms on interstate commerce which provided the touchstone for determining the validity of the tax under the Commerce Clause, regardless of the "label" attached to the tax by a state.

Complete Auto Transit clearly represents the better approach. By rejecting the view that interstate commerce should enjoy a "free trade zone" of immunity from state taxation, the Court has required interstate comerce to "pay its way." At the same time, by focusing on the practical effect of a state tax on interstate commerce, the Court has instituted a realistic, pragmatic approach to legal analysis of the constitutional issues, and abandoned the formalistic search for the correct "label" on the state tax.[24] This approach gives intellectual legitimacy to the Court's Commerce Clause decisions and also goes a

[24]The error of basing a decision upon the "remoteness" or "proximity" of the activity in question to interstate commerce is perhaps best illustrated by *Puget Sound Stevedoring, supra, itself*. In that case, the Court held that the state could not impose its tax on gross receipts derived by stevedoring companies where the companies furnished stevedores to the vessels and directed and controlled the work of the stevedores themselves. On the other hand, the Court saw no problem with the state imposing its tax on gross receipts received by the stevedoring companies when the companies furnished stevedores to the vessels, but did not control or direct the stevedore's work. In the former case, the stevedoring companies were viewed as the employers and in the latter case the stevedoring companies were viewed somewhat akin to an employment agency. Surely this is the classic case of a "distinction without a difference".

long way toward insuring the predictability of court decisions involving state taxation of interstate and foreign commerce.

Not only do the "Stevedoring Cases" represent the outmoded concepts of the "direct-indirect" approach to state taxation of interstate and foreign commerce, but the cases, to the extent they were decided on the basis that a gross receipts tax on local stevedoring activity created a risk of multiple burdens on interstate and foreign commerce (*Carter & Weekes, supra*), were wrongly decided. As noted *supra*, p. 26, the "multiple burdens" test is directed to the risk of multiple taxation on the same activity, and the loading and unloading of ships at the beginning and end of an interstate or foreign journey are two separate activities. *Carter & Weekes, supra*, 330 U.S. at 437 (Douglas, J., dissenting). So long as each state taxes only those activities occurring entirely within its borders, no risk of multiple burdens exists.

The "Stevedoring Cases" should be overruled. The cases are irreconcilable with *Complete Auto Transit*, they represent outmoded concepts of Commerce Clause analysis, they were wrongly decided, and they provide an exemption from state taxation, judicially created, which is unnecessary to the accomplishment of the purposes for which the Commerce Clause was adopted. No reason exists for continued adherence to the principles and philosophy underlying the "Stevedoring Cases."

C. The Challenged Tax on Stevedoring Activities Comports With the Import-Export Clause.

1. *A state may, consistent with the Import-Export Clause, impose a tax on the act or provilege of engaging in the business of transporting goods moving in foreign commerce, i.e., imports and exports, where the tax is nondiscriminatory and not directed at imports or exports as such.*

The Import-Export Clause, Art. I, sect. 10, cl. 2 of the United States Constitution, provides in pertinent part:

> "No state shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. * * *"

The Import-Export Clause is related to the Commerce Clause in that both deal with state taxation of trade between the United States and foreign nations. In several cases, a state tax has been held to be unconstitutional under both the Import-Export and the Commerce Clauses. See e.g., *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419 (1827); *Crew Levick Co. v. Pennslyvania*, 245 U.S. 292 (1917); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Douglas, J., dissenting). There are, however, significant differences in the two clauses. The Commerce Clause is cast in terms of a grant of power to Congress to regulate foreign commerce. The Import-Export Clause, on the other hand, contains a flat prohibition forbidding the states to impose imposts or

duties on imports or exports. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

Not only is the wording of these two constitutional provisions different, but the purposes, although related in some respects, are different. Recently, the purposes of the Import-Export Clause were summarized by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976):

> "The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically. (footnotes omitted)" 423 U.S. at 285.

Of course, the same is true for exports. *Richfield Oil Corp., supra.*

The purpose of the Commerce Clause, as applied to foreign commerce, may be said to be the same as the last purpose of the Import-Export Clause articulated by the *Michelin* court, *supra*—a prohibition of the power of states to erect artificial barriers

and tariffs upon commerce moving through a state and going to or coming from a foreign nation. See, *Brown v. Maryland, supra.*

Over the years this Court has taken several approaches to analyzing the validity of state taxes alleged to violate the Import-Export Clause. One approach was to classify the tax as a "direct" or "indirect" tax on imports or on the business of importing or exporting. In *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), a tax on the privilege of selling goods in foreign commerce, measured by gross receipts, was held violative of the Import-Export Clause because it was a "direct" burden on exports.[25] In *Peck & Co. v. Lowe*, 247 U.S. 165 (1918), a federal net income tax on income derived from the business of exporting goods was upheld against a challenge under U. S. Const., Art. I, sec 9, cl. 5.[26] on the ground that a net income tax was an "indirect" burden on exporting.

Similarly, in *Commonwealth Board of Finance & Revenue v. Northern Metal Co.*, 416 Pa. 75, 204 A.2d 467 (1964), *cert. denied*, 380 U.S. 944 (1965), the Pennsylvania Supreme Court held that the state's corporate net income tax, imposed for the privilege of doing business in the state, could be applied to a stevedoring company loading and unloading vessels moving in a combination of foreign, interstate and

[25]The tax was also held to be a "regulation" of foreign commerce in violation of the Commerce Clause. The tax in *Crew Levick* would also have been invalidated as applied to sales in interstate commerce. See, *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939).

[26]U. S. Const., Art. I, sec. 9, cl. 5 provides in part: "No Tax or Duty shall be laid on articles exported from any State. * * *."

intrastate commerce, where all activities of the company took place within the taxing state. The Pennsylvania court held that the tax did not violate the Import-Export Clause and distinguished *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) on the grounds that *Carter & Weekes* involved a gross receipts tax. As stated by the court:

> "Pennsylvania imposes no tax upon Appellant's gross receipts; rather the tax is upon net income, a factor far removed from the import-export process. Accord, Peck & Co., Inc. v. Lowe, citation omitted." 204 A.2d at 473.

Another approach taken by this Court was in attempting to identify the time at which an absolute immunity from state taxation attached to goods or activities because of the *status* of such goods as imports or exports or the *status* of such activities as importing or exporting. In *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419 (1827), the Court struck down a state license tax required of sellers of imported goods on the grounds that, among other things, the tax reached the imported goods while they were still imports. 12 Wheat. at 443. In *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959), the Court upheld a state property tax on iron ore imported from foreign countries which had been committed to the manufacturing process. The Court found that the iron ore, once committed to the manufacturing process, had lost its status as an "import" and thus was taxable by the state. See also, *Empresa Siderurgica S.A. v. County of Merced*, 337 U.S. 154 (1949)

(state property tax on a manufacturing plant being dismantled and shipped to a foreign country); *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974) (state property tax on business machines stored in a warehouse awaiting shipment to a foreign country). In *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951), a state franchise tax upon a railroad company measured by gross receipts apportioned to the mileage of track within the state was held not to violate the Import-Export Clause even though the railroad transported goods which were themselves imports or exports. The Court fixed the zone of immunity for transporting imports and exports at the "water's edge." As stated by the Court:

> "So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge. Whether loading and unloading would be exempt is a question we reserve." 304 U.S. at 521).

A third approach taken by the Court was to determine whether the state tax in question was an "impost" or "duty" within the meaning of the Import-Export Clause. The answer to this question was determined by reference to the purposes of the Import-Export Clause. If a state tax, whatever its nomenclature, did not cause the evils which the Import-Export Clause was designed to prevent, the tax was upheld. In *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851), the Court upheld pilotage fees imposed by the City of Philadelphia against the argument that these fees

were prohibited "imposts or duties." The Court noted that pilotage fees did not come within the ordinarily understood meaning of the term "imposts or duties" and did not contravene one of the purposes of the Import-Export Clause, uniformity of taxation of imports and exports throughout the United States. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the Court upheld a state's general, nondiscriminatory ad valorem property tax imposed on an inventory of imported tires located at the importer's warehouse. Without addressing the question of whether the tires had lost their status as "imports", the Court held that a nondiscriminatory ad valorem property tax was not a prohibited "impost or duty" on imports. *Michelin*, 423 U.S. at 279.

For our purposes the significance of the *Michelin* decision lies not in its overruling of the "original package doctrine" (*Low v. Austin*, 13 Wall. [80 U.S.] 29 [1872]), but rather in the analysis employed by the Court. Noting that by its terms the Import-Export Clause does not prohibit every state tax on imports, the Court focused on the meaning of the term "imposts" and "duties" with reference to the purposes of the Import-Export Clause. As stated by the Court:

> "The characteristic common to both 'imposts' and 'duties' was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce to tax States situated less favorably geographically.

> "In any event, since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the clause—'Imposts or Duties'—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the clause was specifically intended to eliminate." 423 U.S. at 291-294. (footnotes omitted)

Stated otherwise, restrictions on state taxing power imposed by the Import-Export Clause cannot be determined in a vacuum, nor should such restrictions be determined by resort to the use of "labels." In this respect, the Court is employing exactly the same analysis as that in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)—determining whether a state tax produces effects forbidden by the constitution without regard to the particular label attached to the tax. Surely, this pragmatic approach to Import-Export Clause analysis is vastly preferable to an inquiry into the "direct-indirect" nature of the tax, *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), or a search for the point in time when goods or activities obtain the status of "imports" or "exports", *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951).

The purposes of the Import-Export Clause, as viewed by this Court in *Michelin*, may be stated as follows: (1) to commit to the United States the exclusive power to regulate foreign commerce, (2) to commit to the United States the exclusive right to

all revenues from imposts and duties, and (3) to assure the free flow of imported goods among the states by prohibiting taxation of goods merely flowing through seaboard states to inland states. 423 U.S. at 285-290. As applied to a state tax on the act or privilege of engaging in the business of *transporting* goods moving in foreign commerce, i.e. imports and exports, the purposes of the Import-Export Clause are not undermined where the state tax (1) is a general, nondiscriminatory tax not directed at imports or exports as such, and (2) does not constitute a mere "transit fee" for the privilege of moving goods through a state. *Michelin Tire Corp., supra.*

2. *Washington's B&O tax, as applied to the business of stevedoring cargo in foreign commerce, is a general, nondiscriminatory tax not directed at imports or exports as such and is not a mere transit fee for the privilege of transporting goods through the state.*

We have previously discussed in detail the nature and operation of Washington's B&O tax as applied to the Stevedores. See, pp. 4-6, *supra.* To summarize, the tax is imposed on the act or privilege of engaging in business, measured by gross recipts. RCW 82.04.220 (App. A hereto). The tax reaches virtually every business activity in the state, and the tax rate as applied to the business of engaging in stevedoring activity is the same as most other businesses of a "service" nature, e.g., doctors, lawyers and accountants. RCW 82.04.290 (App. A hereto).

As applied to the Stevedores, the tax reaches only those activities performed entirely within the state.

Does Washington's B&O tax, as applied to stevedores, have any impact on the exclusive right of the United States to regulate foreign commerce? We think not. The tax is a general tax on business. Insofar as stevedoring is concerned, the tax is not directed to imports or exports as such, and does not amount to a tariff on imported goods. To be sure, stevedoring activity, or for that matter any other activity connected with the importation or exportation of goods, could be singled out for special tax treatment amounting to a tariff or preference, but that is simply not the case with Washington's B&O tax under consideration by this Court. In short, Washington's B&O tax as applied to Stevedores does not amount to state regulation of foreign commerce.

Does Washington's B&O tax as applied to stevedoring activity deprive the United States of the exclusive right to all revenues from imposts and duties on imports and exports? Again, we think not. There is no question but that Washington's B&O tax on stevedoring activities *may* increase the cost of importing and exporting goods. But a general, nondiscriminatory state tax imposed to support the governmental services rendered to importers and their contractors has never been thought to be within the prohibition of the Import-Export Clause. As stated by the Court in *Michelin, supra*:

> "The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the

> imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies. See, *e.g.*, *May v. New Orleans*, 178 U. S. 496, 502-504, 507-509 (1900). It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition." 403 U.S. at 276.

Does Washington's B&O tax interfere with the free flow of goods among the states? Stated otherwise, is Washington's B&O tax a mere "transit fee"? Still again, we think not. The tax in question is nondiscriminatory and is not directed at imports or exports as such. It is apportioned exactly to those activities which take place in the State of Washington and does not reach activities taking place elsewhere. Indeed, Washington's B&O tax has exactly the same effect on the process of importing and exporting as Maryland's gross receipts tax on the transportation of goods moving in the import-export stream upheld by this Court in *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951).

As stated by this Court in *Michelin:*

> "There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation

costs associated with those goods." 423 U.S. at 289.

In short, Washington's B&O tax on stevedoring activity does not, and cannot, interfere with the free flow of goods among the states. It is a tax on a wholly local activity; the funds derived therefrom are used to provide governmental services to the Stevedores; and there is not a scintilla of evidence that the tax is designed as a "transit fee" for goods moving through Washington.

Thus, notwithstanding the fact that Justices Douglas and Rutledge in their dissent in *Joseph v. Carter & Weekes Stevedoring Co., supra*, would have held New York's tax on stevedores to be in violation of the Import-Export Clause[27] it is apparent Washington's B&O tax on stevedoring activity does not violate the Import-Export Clause. The tax is not an "impost" or "duty" within the meaning of the Import-Export Clause; it does not produce any of the effects on importing and exporting forbidden by the Import-Export Clause; and accordingly should be sustained.

CONCLUSION

The issue before the Court is whether the Commerce or Import-Export Clause prohibits a general, nondiscriminatory state tax on the privilege of engaging in the business of stevedoring cargo moving

[27]It appears that Justice Douglas may have reconsidered his position only five years later. In his majority opinion in *Canton Ry. Co., supra*, he specifically reserved the question of whether stevedoring activities are immune from gross receipts taxation by reason of the Import-Export Clause. 340 U.S. at 515, quoted *supra* at p. 36.

in interstate and foreign commerce. The Court has clearly indicated in *Michelin* and *Complete Auto Transit* that the proper analysis of questions posed by state taxation of interstate and foreign commerce turns on whether the state tax produces an effect forbidden by these two constitutional provisions, without regard to the type of "label" attached to the tax.

Washington's B&O tax produces none of the effects on interstate or foreign commerce forbidden by these two constitutional provisions, and consequently should be sustained. The "Stevedoring Cases," to the extent that they would invalidate the tax in question, should be overruled inasmuch as the cases represent outmoded methods of analysis and produce results never intended by the Framers of the Constitution.

In sum, interstate and foreign commerce should pay their way, and there is no reason why the states through which such commerce passes should be required to subsidize that commerce except insofar as necessary to prevent states from exacting an unfair tribute from goods and services passing through the state.

Accordingly, the petitioner State of Washington Department of Revenue respectfully requests this Court to reverse the decision of the court below; uphold the constitutional validity of the challenged administrative rule; and thereby uphold the power of

the State of Washington to apply its Business and Occupation Tax to the wholly in-state activities of the Stevedores.

Respectfully submitted,

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APPENDIX A

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.290 Tax on other business or service activities. Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, 82.04.275 and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion, or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

82.04.460 Business within and without state—— Apportionment. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this chapter, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

APPENDIX B

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington

WAC 458-20-193D (Rule 193—Part D)

TRANSPORTATION, COMMUNICATION, PUBLIC UTILITY ACTIVITIES, OR OTHER SERVICES IN INTERSTATE OR FOREIGN COMMERCE

Rule 193 deals with interstate and foreign commerce and is published in four separate parts:

Part A. Sales of Goods Originating in Other States to Persons in Washington.

Part B. Sales of Goods Originating in Other States to Persons in Washington.

Part C. Imports and Exports: Sales of Goods from or to Persons in Foreign Countries.

Part D. Transportation, Communication, Public Utility Activities, or Other Services in Interstate or Foreign Commerce.

• • •

PART D.

BUSINESS AND OCCUPATION TAX, PUBLIC UTILITY TAX

In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

EXAMPLES OF EXEMPT INCOME:

1. Income from those activities which consist of the actual transportation of persons or

property across the state's boundaries is exempt.

2. That portion of commissions received by local brokers or commission merchants for interstate or foreign sales which was paid to out-of-state independent agents is exempt.
3. Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See Rule 194.)

EXAMPLES OF TAXABLE INCOME:

1. Compensation received by persons engaged in business within this state for performance of business activities which are only ancillary to transportation across the state's boundaries is taxable.
2. Compensation received by merchandise brokers or commission merchants for services rendered within this state to principals engaged in interstate or foreign commerce is taxable.
3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Persons, including dock companies or wharfage companies, are permitted no deduction of gross income from services performed in this state consisting of the handling of cargo or freight even though such cargo or freight has moved or will move across the state's boundaries.

No deduction is permitted with respect to gross income derived from activities which are ancillary to transportation across the state's boundaries, such as income received by a wharf company or warehouse company for the storage of goods. The mere ownership or operation of facilities by means of which others engage in foreign or interstate commerce is an activity ancillary to such commerce and any income received therefrom is taxable.

Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francicso, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportion from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the

buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

Revised May 3, 1974.